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ABSTRACT

The existing Copyright Act of 1976 makes it virtually impossible for distance educators to transmit audio-visual or non-dramatic, literary works to students through any medium which may be received by the general public. It is a law that perhaps unintentionally discriminates against distance learning students. Certain revisions of the law are needed to make the richness and variety of all copyrighted works available to distance learners. This paper discusses: the history of the "fair use" concept; risks of information piracy inherent in the ease by which any work may be copied and transmitted electronically; and movements in policy formation, which include the Working Group on Intellectual Property Rights proposed revisions of the Copyright Act to protect works in the digital environment. Recommendations include: (1) finalizing and adopting the proposed Multimedia Fair Use Guidelines; (2) encouraging small-scale experimentation with new fair use policy; (3) distinguishing between "dramatic" and "non-dramatic" audiovisual works; and (4) educating the education community about copyrights. (Contains 24 references.) (Author/SWC)

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COPYRIGHT IN THE PIPELINE

An Examination of Distance Learning Issues and Possible Solutions

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ABSTRACT

The existing Copyright Act of 1976 makes it virtually impossible for distance educators to transmit audio-visual or non-dramatic, literary works to students through any medium which may be received by the general public. It is a law that perhaps unintentionally discriminates against distant learning students. Certain revisions of the law are needed to make the richness and variety of all copyrighted works available to distance learners. There is no doubt that copyright law is necessary to enable writers and producers to profit from their creations so that they may be given the incentive to produce more works. "Fair use" a concept which originated in the courts, enables the public to benefit from those works without permission of the copyright holder, within certain limits. Non-profit educational institutions are granted much leeway in "fair use" as a result of the Copyright Act, but not enough to meet distance learning needs. The digital age threatens copyright holders due to the ease by which any work may be copied and transmitted electronically. The Working Group on Intellectual Property has proposed revisions of the Copyright Act to protect works in the digital environment. And a coalition of educators and publishers have drafted new guidelines governing use of copyrighted works in "multimedia." One of these guidelines allows for transmissions provided they are accessible only by students. But additional changes in law are needed to loosen some restrictions on the use of works in distance education. And experimentation on a regional scale should be encouraged to test innovative technological strategies that would benefit the distance educator and student while protecting the legitimate interests of the copyright holder.

THE NATURE OF THE PROBLEM

Tales from the murky world of intellectual property...

For the media specialist it is a maddening, torturous scenario: An art professor planning to begin teaching "art appreciation" over cable TV next semester wants to do what he normally does in his classroom: Show high quality videos on art works by Van Gogh, da Vinci, O'Keefe, and a host of other great artists. But the media specialist warns of legal barriers to his efforts-- clearance must be granted for each video before it can be shown on the local cable system. And so the media specialist begins to identify and contact copyright owners to obtain clearances with frustrating results. How frustrating? In some instances the distributor, the one who's selling the work, refuses to identify the copyright owner. The Copyright Clearance Center, which negotiates clearances for print materials, says it "doesn't do videos." A call to a major publisher leads down a complex tree branching of voice mail menus until the call eventually winds up out on a limb. Or, the copyright owner may be overseas, and the call is answered by a voice speaking French, on tape, repeating its message over and over again. On those few occasions when the copyright owner is identified, a letter seeking permission is sent, only to get a terse reply. A copy of the distributor's policy is sent back with areas highlighted in yellow forbidding transmission over a cable TV system. And so, the entire "art appreciation" course looks like it may very well devolve into a "talking head" program with a cablecast reminder to students that they must drive to campus in order to view the films in the college library learning center. So much for distance learning.

How about the nursing professor who wants to show a video on the subject of therapy to her distant students who are watching the course on satellite

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television? It's in the law of the land that she can perform that 30-minute educational video to her students in a classroom setting, the Copyright Act of 1976; but it's also in the same law that says she cannot show the video to her students at remote sites linked via satellite, cable TV, fiber optics, microwaves, or any other means of telecommunication. It is a law that, perhaps unintentionally, discriminates against distant education students who are bound by the same demands as "traditional" students.

Two regimes of works in copyright law, but one in the digital age

The digital world could be considered an "equal opportunity" application: All works are treated equally. Regardless of the medium used, they can all be converted to binary language, zero's and one's, and transmitted to a receiving computer where they can be copied or performed, and then reconverted into their analog form which can be perceived by human senses. But while all works receive equal treatment digitally, such is not the case in the legal environment of the Copyright Act. Section 110 of the Act allows you to transmit, without permission, "non-dramatic, literary" works such as print, pictures, charts and maps through a telecommunications system, but only directly to classrooms or to certain individuals who may be disabled. However, the Act completely blocks transmission of any type of work if it can be received by the general public. And as for audio-visual works, the pipeline is closed to any kind of transmission, period. It is a dilemma which is expressed succinctly in a question raised by Arnie Lutzker, an attorney practicing copyright law in Washington D.C.

> When face to face (teaching) expands out of the classroom as it has in distance learning, what can be done with copyrighted materials both as a respect for the rights of copyright owners who have invested and created works for an educational market..., and the need of educators to communicate with students wherever those students may be? ("Multimedia Fair Use Guidelines" teleconference, 9/21/95)

It is a question for which there is no clear cut answer, nor is there likely to be in the latest revisions of copyright law and fair use policies now pending in this country. But there are a few ideas being considered which could lead, perhaps, to the synthesis of a solution that would empower educators and students to avail themselves of the full potential of all copyrighted works in the telecommunications pipeline.

COPYRIGHT POLICIES IN HISTORICAL CONTEXT

There is no argument that a purpose exists for copyright. As long as people earn a living by the sweat of their brow, there will be those who are entitled to profit from the rigorous toil required in the act of creating a picture, a novel, a journal article, a song, or a motion picture. And, as argued publishers and policy-makers alike in many forums, if people cannot benefit financially from the products they have put so much of their time and effort into creating, they will stop trying altogether. The civilized world will become a vacuum devoid of intellectual expression in all its forms. And yet, what good would it do for society as a whole if those works could not be used by those for whom they were created: the public? Such is the dual purpose of copyright law-- to safeguard the interests of both the copyright holder and the user-- since its inception in 1790. The first federal copyright legislation dealt with protecting

ownership of "maps, charts, and books." Each successive iteration of copyright law was designed to accommodate major technological changes in forms of expression: the 1802 law (print technology); the 1909 Act (motion pictures included for the first time), and the current 1976 Act which took into account new reprographic technologies, from photocopying to videotaping (Sinofsky, 4). In the period leading up to 1976, it was videocassette recording and photocopying which made it possible for consumers to seamlessly and rather easily produce copies of works without the expense of buying major production equipment. As we speed headlong into 1996, it's the ability to digitize which has the publishing world in an uproar.

> The establishment of high-speed, high-capacity electronic information systems makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to scores of other individuals–or to upload a copy to a bulletin board or other service where thousands of individuals can download it or print unlimited "hard copies" (Lehman).

To a publisher, this is scary.

Then there is the concept of "fair use" (by the consuming public) to consider. Intending to balance the property rights interests of authors and publishers with the first amendment right to free expression, "fair use" was introduced by American courts early in the nineteenth century. In the recent teleconference on "Multimedia Fair Use Guidelines" (September 21, 1995), Assistant Secretary of Commerce Bruce Lehman, a keynote speaker, summarized the concept of fair use in clear, understandable terms:

> The concept of fair use arose out of tensions between copyright law and the First Amendment, with courts attempting to balance the exclusive rights of copyright owners with the rights of scholars, critics and others to speak and write freely.

"Fair use" rulings surfaced now and again in the courts until it was legislated as Section 107 of the 1976 Act. But it was a faltering attempt, listing criteria for fair use but failing utterly to give a clear definition:

> There is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . the courts must be free to adapt the doctrine on a case-by-case basis (1976 House Report)."

But the courts have only "adapted" the fair use doctrine in fits and starts, never clearly delineating the boundaries within which fair users may operate free of infringement and the potential for the 1976 Act to bear its teeth. And indeed it does have teeth: $500 to $20,000 dollar fines per infringement of each work; up to $100,000 when the infringement is "willful" (Lutzker). One landmark case (Sony) made it legal for private citizens to tape their favorite shows on their home VCR for "timeshifting" purposes, but yet another case (BOCES) made it patently unlawful for an educational institution to massively and systematically copy audio-visual programs for teaching purposes, as summarized by Sinofsky. For printed works, recent federal court cases appeared to have a chilling effect on photocopying for educational or research purposes. But as legal copyright expert Kenneth Crews indicates, "fair use is alive and well"; the cases pertain to

infringement by commercial users of materials and do not necessarily impact non-profit educational institutions ("Copyright Law, Libraries, and Universities: Overview, Recent Developments, and Future Issues", 1992).

Education and the publishing world have been in a state of tension in varying degrees over fair use issues since intellectual property rights were first legitimized (Sinofsky, 4):

> In fact, fair use is a contradiction of the basic concept of copyright: Copyright grants an author an exclusive monopoly on a particular work; fair use provides that someone other than the author can have certain rights regarding the work. . . without payment to. . . the copyright owner. Is it any wonder, then, that controversy surrounds fair use (10)?"

The powerful tussling between academe and copyright holders apparently resulted in the current 1976 language which represents a compromise. Then in the early 1980's, guidelines for off-air videotaping were agreed upon by constituencies from education and film publishers. Read into the congressional record but never enacted as law, the "Kastenmeier" guidelines allow educators to video record programs off the airwaves and use them in the classroom, twice, within ten days. For another thirty-five days they may keep the program for evaluation but then must purchase the rights to use the program or erase the tape. These guidelines did address timely issues of the day regarding audio-visual works, but by the end of the decade, as distance learning began to explode, new problems were beginning to surface.

THE CLOUDED PRESENT

The past five or six years have seen a blizzard of unresolved questions swirl about the use or performance of copyrighted materials in distance learning, "the transmission of education or instructional programming to geographically dispersed individuals or groups (Sherron)." The term "distance learning" is not meant to pertain only to audio-visual works, but all types of works used in mediated learning: via satellite, cable television, microwave, fiber optics, or "computer mediated distance learning (CMDL)." The mere fact that any copyrighted work, be it print, photographic, or audio-visual can be digitized, transformed, compressed, distributed and reproduced, all virtually without detection, raises fears that copyright is dead or at least gasping its last breath. Some even hold the belief that publishing on the internet is equivalent to giving up your copyright as several e-mail messages to a copyright listserv (CNI-COPYRIGHT@CNI.ORG) would attest. Others, more wisely perhaps, advise a more cautionary stance in view of recent lawsuits and cease and desist letters instigated by authors and publishers who are challenging efforts to publish on "on-line" without permission (Botterbusch, Greguras). Consider recent examples reported in 1995:

- √ The Church of Scientology demanded that Usenet be shut down because some of its documents appeared on-line (Gunn).

- √ Some perpetrator transferred more than 800 works of great literature from a CD-ROM published by World Library, removed the copyright notice, and posted it on the Internet (Coleman, 69).

- ✓ A Star Trek fan somehow accessed the unreleased script to the movie "Star Trek VII, Generations", in digital form, and e-mailed it to 20 of his friends, resulting in a stern call from Paramount (Clark).

- ✓ In apparent response to a lawsuit filed by 8 members of the National Writer's Union against publishing works on-line without permission, publishers are beginning to require authors to sign a release allowing reuse of their works in another medium (Coleman, 70)

It is abundantly clear that the ease and convenience of manipulating information in this digital era is fraught with the risks of piracy, willful or unwillful. Ron Coleman writes in the ABA Journal (July, 1995) that "The copyright laws... first printed centuries ago with hand-set type, no longer seem appropriate for numeric codes and hypertext links (69)." Others, at the highest levels of policy formulation, believe that the Copyright Act of 1976 need only be fine-tuned to become applicable to the digital era. The "Working Group on Intellectual Property Rights" chaired by Assistant Bruce Lehman, Assistant Secretary of Commerce, believes that a free-for-all relaxation of copyright laws on the NII ("Information Superhighway") would lead to a cyberspace version of Dodge City (Lehman, 15). But the Working Group doesn't believe that major changes are needed to protect the legitimate interests of copyright owners:

> With no more than minor clarification and limited amendment, the Copyright Act will provide the necessary balance of protection of rights-- and limitations on those rights-- to promote the progress of science and the useful arts. Existing copyright law needs only the fine tuning that technological advances necessitate, in order to maintain the balance of the law in the face of onrushing technology (Lehman, 17).

The Working Group's recommended policy changes, to be discussed later, appear to address the many concerns of copyright owners and users when it comes to most types of works. But while there is plenty of substance in these recommendations regarding the manipulation of text, graphics, music, and pictorial works that might appear in computer-mediated distance learning, there is very little said about what to do with audio-visual works.

Policy development at the college and university level has found it torturously difficult to deal with distance learning and copyright issues. The University of California system warns the educator to be "fully aware" of infringement potentialities and to abide by license provisions. Similar admonishments or proscriptions can be found in policies adopted by the University of New Mexico and the University of Texas system. Absent those provisions, California recommends "that educators contact the copyright holder in writing for permission to manipulate or use these technologies in alternative ways." However, unless one is fully knowledgeable and intimately acquainted with contacts in the publishing world, getting written permission is analogous to pushing your way through coils of barbed wire.

Scholarly journals only confirm and verify what the distance educator already knows. The University of New Mexico nursing professor can show that therapy video to her nursing students in a "face-to-face teaching activity" but there is no legal way for her to transmit it via satellite to remote learning sites in New Mexico. It has become a hot topic in academic circles; authors in refereed

journals are calling for a reevaluation of certain sections of the 1976 Copyright Act:

> The Copyright Act should encourage the use of any educational materials in distance learning programs. . . course-enriching audio-visual works will only be relevant to students enrolled in the class. . . If professors are forced into the difficult and time-consuming procedure of obtaining permission from owners before using any copyrighted materials in class, students will be disadvantaged (Switzer; Switzer).

And, prominently, copyright expert and law professor Kenneth D. Crews of Indiana University asserts, "I see dist-ed (sic) as an area badly in need of legislative reform." Crews is currently trying to document difficulties faced by educators and media specialists who "are precluded from transmitting video, dramatic readings, etc." (e-mail to McKay, 7/5/95). Crews, who has testified before Clinton administration hearings on intellectual property and has written and lectured widely on the issue, says he will use the information in an effort to change the Copyright Act so that it is more favorable to distance learning.

POLICY FORMULATION IN THE DIGITAL AGE.

There are currently efforts pending to make apparently minor revisions in the Copyright Act of 1976 to enable it to accommodate the rapidly changing technological landscape. The tensions over fair use between the publishing world and the user's world can hardly be discounted in leading up to the current state of affairs. The rift appears strikingly in the debate over intellectual property rights and the development of the National Information Infrastructure (Information Superhighway) proposed by the Clinton administration in 1993. At that time the White House issued marching orders to establish the NII with the professed goal of extending "universal service" to all. Much as the telephone giants achieved their goal of putting a telephone in virtually every home in the U.S., economically, the White House aspires to similar objectives. The theme of avoiding the creation of a society of information "haves and have-nots" appears in the original Fact Sheet on the NII by the Clinton administration. As part of this omnibus effort, the Working Group was convened to deal with intellectual property issues. With the issuance of a so-called "Green Paper" in July, 1994, the battle was joined. In maintaining that the 1976 Copyright Act was sufficient to protect the rights of copyright owners, it also proposed revisions which were hailed by publishers and scorned, by and large, in the educational community. A few snippets of testimony from hearings conducted by the Working Group reveal the tense and conflicting perceptions of copyright among both publishers and users:

> A few taps on a keyboard and up pops a book. A quick scroll through a few pages and there it is, the information you seek. Read it, maybe take some notes or clip it for a term paper. You no longer need that book.

Such is the essence of publisher's concerns, as put by Paul Aiken of the Authors League of America in testimony on the Green Paper recorded Sep. 22, 1994. Aiken even proposed that those who browse information electronically

should be required to do so in a library setting only. Paul Batista, National Vice President for Legislation, representing the Graphic Artists Guild, testified that, "Members of the Graphic Artists Guild have reason to be concerned by the (notion) that the Copyright Act exists for the benefit of the public.... Such a view is simplistic at best."

Others might venture to say that such a view as Batista's is simplistic at best, or preposterous at worst. From the academic world came witnesses who testified that fair use is the public's intellectual magna carta, and that "compensation for intellectual property rights should not prohibit the use of visual or textual materials for teaching and scholarly research. (Sandra Walker, President of the International Visual Resources Association)."

Perhaps most alarming was a proposal in the Green Paper to overturn the "first sale" doctrine for transmitted copies of works. This "right of first sale" in Section 109 is what allows purchasers of works to sell, loan, or dispose of works in any way they see fit. The Green Paper proposed that this right be eliminated when works are acquired by digital transmission. Small wonder then that Attorney Morton David Goldberg for the Intellectual Property Owners organization, testified, "IPO does not merely applaud the work that went into the Green Paper. IPO applauds the Green Paper."

A sharp retort was published in The Chronicle for Higher Education by Kenneth Frazier on June 30, 1995:

> Publishers and software producers are seeking an absolute monopoly on the rights to digitize, store, and transmit copyrighted information. Once in complete control of the rights to electronic information, they intend to offer licenses and contracts that will define the extent to which information users may (or may not) read, browse, print, copy, share, lend or retransmit copyrighted works.

The Working Group evidently listened to these expressions of alarm as they evolved the "NII White Paper" which was finally released on September 5, 1995. This follow-up to the Green Paper, Intellectual Property and the National Information Infrastructure, no longer contains a proposal to abolish the "first sale" doctrine and uses language that affirms the concept of fair use and special exemptions for libraries, including interlibrary loaning via transmission.

> While it is clear that Section 108 does not authorize unlimited reproduction of copies in digital form, it is equally clear that Section 108(g)(2) permits "borrowing" in electronic form for interlibrary loan in the NII environment, so long as such "borrowing" does not lead to "systematic" copying (89).

What's more, the White Paper also recommends that libraries be allowed to make three copies, not just one, of works in a digital format so long as only one of those copies is in circulation while the other two are archived. And it recommends the law be revised to allow for the creation of works for visually impaired students (enlarged text or Braille) so long as the copyright owner has not already produced such works (226).

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This had to be heartening news to the American Library Association which responded to the release of the White Paper on September 8, 1995, but its position also included this cautionary language:

> Both the White Paper and the agencies responsible for it appear almost totally focused on the information infrastructure's commercial potential. ALA has argued, and will continue to do so, that the information infrastructure can and should be used to expand markets, but that such expansion must be accompanied by the expansion of equitable public access... ALA rejects the notion... that the protection of copyright owners is the basis of copyright law. Rather, libraries contend, the law is based on a presumption in favor of the wide dissemination of ideas at the core of the First Amendment and the intellectual property clause of the Constitution (ALAWON, Volume 4, Number 80, September 8, 1995).

It's important to point out that the White Paper argues forcefully that the driving force for the establishment of the NII will be the content that flows through it, not the technology. And it asserts that only by the protection of the content owner's rights will there be an incentive for creativity that will spur the production of still more content, a position which is fundamentally core to that of publisher's groups, and contested by the ALA. The tension still exists, although there have been still more new developments to ameliorate some of that conflict.

On September 21, 1995, the Consortium of College & University Media Centers (CCUMC) and the PBS Adult Learning Satellite Service jointly sponsored and presented the "Multimedia Fair Use Guidelines" teleconference which was received by a reported 600 sites across the United States. These proposed draft guidelines go a long way toward achieving a middle ground between copyright owners and the academic world over the use of works in multimedia products that are certain to become a component of distance learning. Although there are still a few wrinkles to iron out, and plenty of lively debate to come, these guidelines may very well become as historic as the Kastenmeier Guidelines for Off-Air Videotaping. A cursory summary would not sufficiently elucidate the content of these proposed guidelines, and is not intended to substitute for a thorough reading, but a core idea can be derived as follows. Both students and instructors would be able to use small portions of lawfully acquired copyrighted works to incorporate into the creation of multimedia products for teaching and presentation purposes. These products could also be performed or displayed by instructors in "peer conferences," and be held for two years, after which permission must be sought to retain the materials. And, in a nod to distance learning, there is also a provision for "Remote Instruction":

> Educators may use portions of lawfully acquired copyrighted works in producing their own multimedia educational programs to be used for curriculum-based instructional activities provided over an educational institution's electronic network, provided there are technological limitations on access to the network programs (such as a password or PIN) and on the total number of students enrolled.

This language represents the input of the Instructional Telecommunications Council, affiliated with the American Association of Community Colleges, which

has sought to liberalize policies to allow transmissions in distance learning situations. The ITC's executive director, Chris Dalziel, in a spring, 1995, newsletter, echoed the argument that current law was outdated and impinged on distance educators' efforts to perform, "particularly by video," any audio-visual works, non-dramatic literary or musical works, and that efforts to gain permission are costly and time-consuming. Her group recommended a redefinition of "non-profit educational instruction" under Section 107 (fair use), to include "teaching at a distance to students through the use of telecommunications technologies to transmit and receive voice, video and data." This recommendation did not make it into the Multimedia

Fair Use Guidelines, but the ITC's other recommendation did: The ITC had suggested that transmission be directed "wherever the student is located as long as the student is formally registered for the course" and provided the transmission was embodied in a closed system. Dalziel said in a telephone interview on October 5, 1995, that the provisions for "Remote Instruction" reflect the ITC's recommendations. While a more sweeping provision to allow broadcasts of educational copyrighted works to students, even though capable of being received by the general public, would have been preferred, "it was one of the things we had to give some on," Dalziel said.

Copyright Protection

It's important to mention that the White Paper by the Working Group on Intellectual Property Rights also recommends certain technological protection methods to ensure that copyrighted works are safely kept from piracy. These methods include encryption, digital signatures, on-line copyright management systems, "electronic contracts" and others. The intention is to provide a uniform means of identifying the author or creator of a work, authenticate the contents, secure transmission, identify the purchaser of the work, and otherwise efficiently and securely manage copyright information in a digitized environment. It is contended that only by use of technological protection methods will content move on the NII: "Copyright owners will not use the NII... unless they can be assured of strict security to protect against piracy (196)." To this end, the White Paper proposes changes in federal law that would outlaw the use of devices, equipment, or methodologies that are designed to defeat or circumvent technological protection methods. And it includes a proposed companion measure to require truth in reporting copyright information digitally, with criminal sanctions against the removal or alteration of digital copyright information. These recommendations are now embodied in "The NII Copyright Protection Act" introduced in both the House (H.R. 2441) and Senate (S. 1284) in late September, 1995.

The debate over policies to accommodate intellectual property and the digital age has clearly matured greatly over the last few months, and all constituencies seem to be on the verge of adopting compromises to balance the needs of publishers, educators, libraries, and the public. However, for the stepchild of intellectual property law in this decade, distance education, progress toward making works accessible to students appears to be moving forward at a snail's pace. It is to this issue we now turn.

RECOMMENDATIONS

That copyrighted works can and should be used in distance education as effortlessly as they can be used in the classroom is an issue of fairness, of "fair use" in copyright and of equitability in general. Students in distance learning are entitled to the same richness and variety found in audio-visual works as their peers enjoy in "traditional" education. But under current law, media specialists and educators must jump through hoops to win permission to use materials that would probably never enjoy any kind of audience except an academic one. People will shell out five dollars a ticket or more to see Sylvester Stallone or Sharon Stone, but they are unlikely to attend the performance of, shall we say, a film on "photosynthesis" even if it's free. So how is it a transgression to present a non-dramatic, educational AV film in a distance learning environment? Not only are audio-visual works proscribed by existing Copyright law, all other non-dramatic, literary forms of expression are barred from transmission if received by the general public (Section 110).

Finalize and adopt the Multimedia Fair Use Guidelines

There is observable progress toward leveling the playing field for distance learning in the proposed Multimedia Fair Use Guidelines. The recommendation for "remote instruction" that allows for works to be encoded and transmitted to students if they have a password or PIN is a step in the right direction; and it is certainly consistent with the use of encryption technologies advocated by the NII White Paper. Therefore, what if a community college scrambled a picture, just as is done for premium cable channels and "pay-per-view" programs, so that it would be accessible only by students who own a set-top converter/decoder? Would this be allowed under the proposed guidelines? Chris Dalziel, ITC executive director, says "In my view it would and according to the guidelines it would because it would be only accessible to the student." Whether or not this interpretation is accepted begrudgingly or not by publishers and other copyright owners, the Multimedia Fair Use Guidelines must be finalized and "signed off" by all constituencies. And to avoid direct conflict with the Copyright Act of 1976, certain sections of the law should be fine-tuned to allow transmissions over a system which is closed by encryption technologies. Section 110 in particular, could use a face lift to explicitly acknowledge that use of encryption (scrambling) is a legitimate method to allow for the transmission of not only "non-dramatic, literary" works, but audio-visual works as well.

Encourage experimentation on a limited scale

Some community colleges, universities, and other institutions of higher learning have more limited financial resources than others due to such factors as a tax base which is down because of a regionally depressed economy. Such institutions may not be able to afford expensive encryption technologies to protect their transmissions, nor may students be able to afford the set-top converters that would unscramble the picture. There are, however, certain less expensive technological measures which could be tried to protect works from piracy. In defined geographical areas such as rural settings, experimentation with these measures should be encouraged along with an accountable method of evaluation to determine "what works." A couple of examples follow.

It may be observed from watching premium channels that, during subscription drives when free programming is cablecast, the top box office movie is "windowed" inside of a picture and bordered by promotional information.

During HBO's recent push for subscribers, popular motion pictures such as "True Lies" and "TimeCop" were shown in windows that were barely half the size of the television screen. The remaining spaces were occupied by text including HBO's toll free number to call in order to get a subscription. If this isn't obvious it ought to be: The purpose for "windowing" the movie is to make it impossible for the viewer to tape the program and pirate it.. I would advocate that if HBO can do it with Arnold Schwarzenegger and Jean-Claude van Damme, then XYZ Community College should be able to do it with Professor John or Jane Doe. Even if an educational film such as "Artists in Wonderland" (Films for the Humanities & Sciences) were to be broadcast in full-size on a local cable access channel, it would be doubtful that anyone other than an art appreciation student would watch it. Putting it in a window surrounded by text information would make piracy a moot concern. The switching devices that make windowing possible are low-priced and relatively affordable for the budget-minded college.

Institutions of higher learning could also use another technique used by networks and "superstations" to identify the source of the programming: a small logo at the bottom right corner of the screen. The viewer would know that the program is coming from XYZ Community College because the logo: "XYZ" appears translucently in the corner of the screen. And viewers who would tape and try to pirate the program may find it difficult to do so because the logo would tip off other users that the program was copied illegally. Perhaps the logo should be a more blatant warning: During transmission, put a small message at the bottom of the screen which warns against illegal duplication, or symbolize the warning with a small "D" that has a circle slash drawn over it. This would put the onus on the viewer who perhaps would tape it for "timeshifting" purposes allowed by the Supreme Court, but not use it outside of the home. And if the film were shown outside the home, in a classroom for instance, then the user could be "caught" by an observant student and be exposed to infringement penalties. It would be interesting to see how often that would happen; probably not very frequently, if at all.

Distinguish between "dramatic" and "non-dramatic audio-visual works"

No such distinction is drawn in the Copyright Act of 1976. Legally, a Tom Hanks movie is treated equally in comparison to a film about "photosynthesis." It would be relatively easy to devise a policy that would forbid the use of a dramatic film released theatrically; but allow the transmission of an educational video purchased by a non-profit educational institution. Granted, films (such as "The Civil War" by Ken Burns) aired by public television stations and networks might not qualify for such an exemption. Nevertheless, if the film was not created for public broadcast, but instead for face-to-face teaching purposes, that's the type of film that can and should qualify for teaching applications that go beyond the classroom.

Educate the educational community about copyright

This is a major recommendation of the NII White Paper. The Working Group on Intellectual Property Rights advocates the position that all of us have the responsibility to become more aware of intellectual property (201-203). It is asserted that "intellectual property" needs to become a "household word." Whether or not this is feasible or fantastic pie-in-the-sky dreaming when not even lawyers and courts can agree uniformly on "fair use" issues is a topic beyond the reach of this paper. But clearly, we could all do a better job of learning and understanding copyright fundamentals. It is a sad testimonial to the

educational profession, and a contributing stressor to the tense relations between academe and copyright owners, that so little of us understand or even acknowledge the importance of copyright. In a 1994 survey of media specialists at 200 colleges and universities conducted by the Association for Educational Communications and Technology, only 15% of 144 respondents answered correctly three fourths of the questions put to them about copyright (Wertz, Chase). It is a small wonder then that copyright owners wants to pull in the reins of fair use and keep them tight, at a price, to higher education. We all need to get our act together if we expect to reap the many benefits the digital revolution makes available to us at the lowest price possible.

"Multimedia Fair Use Guidelines" A teleconference presented by the Consortium of College and University Media Centers and PBS Adult Learning Satellite Service September 21, 1995

"Preliminary Draft of the Report of the Working Group on Intellectual Property Rights (Executive Summary)" Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure. 7/94 (via internet).

Bennett, Doug "Purposes of Fair Use, The." American Council of Learned Societies. November, 1994

Botterbusch, Hope R. "Copyright Activities at InCITE'95" TechTrends April/May, 1995

Clark, Charles S. "Regulating the Internet" CQ Researcher Vol. 5, no. 24 June 30, 1995 563-565

Coleman, Ron "Copycats on the Superhighway" ABA Journal July, 1995 69-70

Crews, Kenneth D. "Copyright Law, Libraries, and Universities: Overview, Recent Developments, and Future Issues" San Jose State University (internet). October, 1992

Dalziel, Chris "ITC Joins Diverse Group to Discuss Fair Use, Intellectual Property Rights and the NII" Instructional Telecommunications Council. Spring, 1995

Frazier, Kenneth "Protecting Copyright-- and Preserving Fair Use-- in the Electronic Future" The Chronicle of Higher Education. June 30, 1995

Greguras, Fenwick "Strategies for Striking Deals" Fenwick & West law firm web page. Palo Alto, CA 3/15/95

Jackson, Robert L. "Publishers and the Net" The Chronicle for Higher Education June 23, 1995 A17

Lehman, Bruce A. Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights September, 1995

Lutzker, Arnold P., Esq. "Primer on Distance Learning and Intellectual Property Issues, A" Dow, Lohnes & Albertson law firm. March 1994

Sherron, Gene T. "Distance Education: What's Up" Florida State U. CAUSE, 1994

Sinofsky, Esther Off-Air Videotaping in Education Bowker, NY, NY 1984

Switzer, Jamie S.; Switzer, Ralph V. "Copyright Question: Using audio-visual Works in a Satellite-Delivered Program" T.H.E. Journal. May, 1994 76-79

Wertz, Sandra L.; Chase, Mark E. "Media Directors and Copyright Issues: How Much Do We Really Know" TechTrends. April/May 1994

In addition, several works were consulted which appear on web pages for various universities. Being a "newbie," I neglected to note the URL's. Nevertheless, the titles appear below:

"Additional Considerations and Clarifications in the Use of Copyrighted Materials" Office of Media Services & Moffitt Media Resources Center, University of California at Berkeley (internet, 6/95).

-- "Copyright Guidelines and Fair Use" University of New Mexico, circa 1995

-- "Frequently Asked Film and Video Copyright Questions" Office of Media Services and Moffitt Media Resources Center, University of California at Berkeley. (internet, 6/95).

-- "Guidelines for the Use of Films, Videotapes, Filmstrips, Overhead Transparencies, and Slide Programs" Office of Media Services & Moffitt Media Resources Center, University of California at Berkeley. (Internet, 6/95)

-- "Guidelines for the Use of Copyrighted Materials" Office of Media Services & Moffitt Media Resources Center, University of California at Berkeley. (Internet, 6/95)

-- "Video, Audio and Radio" University of Texas System (via html)

-- "Using Materials obtained from the Internet: What are the Rules; Performance Rights in the Electronic Environment" University of Texas system, via html.